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IN THE

Supreme Court of the United States

Term, 19

No. 433

CHARLES W. COCKFIELD, *Petitioner*

vs.

COMMONWEALTH OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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INDEX

	Page
Opinions Below	1
Jurisdictional Statement	2
Questions Presented	2
Constitutional Provisions	3
Statement of the Case	4
Argument	6
Appendix "A" (Opinion of the Supreme Court of Pennsylvania)	10

TABLE OF CITATIONS

Cases:

Agnello v. United States, 46 S. Ct. 5	7
Carrol v. United States, 267 U. S. 132	8
Chapman v. United States, 365 U. S. 610	7
Harris v. United States, 67 S. Ct. 1098	7
Johnson v. United States, 333 U. S. 10	7
Kerr v. California, No. 53, October Term, 1962 Supreme Court of United States	6
Mapp v. Ohio, 80 S. Ct. 1684	6
Rabinowitz v. United States, 70 S. Ct. 430	7
Taylor v. United States, 286 U. S. 1	7
United States v. Jeffers, 342 U. S. 48	7

Other Authority:

United States Constitution, Amendments IV, V and XIV	5 et seq.

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The Petitioner prays the Supreme Court to grant a writ of certiorari to review the judgment of the Court below.

OPINIONS BELOW

The opinion of the Court of Quarter Sessions of the Peace of Philadelphia County is not reported. It appears in the printed record before the court below at page 34a.

The opinion of the Supreme Court of Pennsylvania (Jones, J.) and the dissenting opinion (Cohen, J.) are reported at 411 Pa. 71 and appear at pp. 10-17, infra, as Appendix A to this Petition.

JURISDICTIONAL STATEMENT

The Order of the Supreme Court of Pennsylvania which this Petition seeks to review was entered April 16, 1963. A petition for reargument was denied June 3, 1963.

Jurisdiction of this Court is conferred by 28 U.S.C. Section 1257(3).

The following cases sustain the position of the Appellant that this court has jurisdiction to hear this petition and they also support the proposition that where a United States right, privilege or immunity applies, federal and not state law is supreme. *Kerr v. California*, No. 53, October Term, 1962; *Brooklyn Sav. Bank v. O'Neil*, 65 S. Ct. 895, Rehearing denied 65 S. Ct. 1189; *Titus v. Wallick*, 59 S. Ct. 557; *Jones v. United States*, 80 S. Ct. 725; *J. F. Fitzgerald Const. Co. v. Pedersen*, 65 S. Ct. 892; *Blackburn v. State of Ala.*, 80 S. Ct. 274; *Payne v. State of Ark.*, 78 S. Ct. 191; *Cash v. Culver*, 79 S. Ct. 432.

QUESTIONS PRESENTED

1. Whether the search without a warrant of Petitioner's parked automobile some fifty-four hours after petitioner's arrest, where petitioner was not present during the search, but was in continuous custody, can be viewed as a search incidental to a lawful arrest and not violative of the 4th, 5th and 14th Amendments of the Constitution of the United States.

2. Whether the 4th, 5th and 14th Amendments to the Constitution of the United States prohibit the admission into evidence in a state court proceeding of objects, things or other evidence obtained in the search of petitioner's parked automobile where the search was without a warrant some fifty-four hours after petitioner's arrest, where petitioner was not present during the search, but was in continuous custody.

CONSTITUTIONAL PROVISIONS

AMENDMENT IV. (1 U.S.C., p. XLVI)

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT V. (1 U.S.C., p. XLVI)

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT XIV Section 1. (1 U.S.C., p. XLVII)

"Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On the morning of April 7, 1960, a fire occurred in a dwelling on North Frazier Street, Philadelphia, Pa., which took the lives of several people. Upon information received at the scene of the fire, Detective Raifer and his brother detectives proceeded to the residence of defendant at 277 South Alden Street. Not finding defendant at his residence, Detective Raifer returned to his office and attempted to ascertain what type of automobile might belong to defendant. The detective returned at 5:30 A. M. the same morning, attempted once again to gain access to defendant's residence and finding no one there, proceeded to search the immediate neighborhood for defendant's car. The car in question was found on the 5700 block of Spruce Street, approximately three-quarters of a block from defendant's house. Both the residence of defendant and his car were kept under surveillance until 8:15 A. M. that morning, at which time the detectives searched the trunk of the defendant's car. In the trunk they found a can of gasoline and a roll of green toilet-paper tissue. Beneath the car there was a wet spot which appeared to Detective Raifer to be gasoline (N. T. 9-14). The detectives then proceeded to push the car to the station-house at 55th and Pine Streets. In order to make certain that the car would not be removed from the station-house, Detective Raifer removed the distributor cap and disconnected the wires. That afternoon Detective Raifer was informed that the car was no longer in front of the station-house but had been removed by someone (N. T. 20). Later that same evening defendant was brought to the station-house for questioning in connection with possible charges of arson and murder. On Friday, April 8, 1960, defendant was arrested and was taken at 10:00 A. M. to the headquarters of the Homicide Unit at City Hall. There he underwent a polygraph examination and questioning. At this time defendant gave the officers a statement regarding his activities on the night of the fire. After the defendant gave the statement to the officers at City Hall he was taken back to the station-

house at 55th and Pine Streets. On April 9, 1960, a hearing was held before a magistrate at which time defendant was charged with homicide by arson. Sometime during that day the defendant's car was recovered by the police and brought once again to the station-house at 55th and Pine Streets. On Sunday, April 10, 1960, without first having procured a search warrant, the officers searched defendant's car which was still outside the station-house. In it they found and seized the gasoline can and tissue paper referred to above.

Petitioner was indicted on the following charges:

1. Arson—Bill of Indictment No. 688, May Sessions, 1960. 2. Murder—Bill of Indictment No. 689, May Sessions, 1960. 3. Murder—Indictment No. 690 and 691, May Sessions, 1960. 4. Voluntary and Involuntary Manslaughter, No. 692 to 694, May Sessions, 1960.

The Petitioner filed in the Quarter Sessions Court for the County of Philadelphia May 4, 1962, a timely Petition, to Suppress the Evidence in the instant case based upon the ground that the evidence was obtained by an illegal search and seizure in violation of the 4th, 5th and 14th Amendments to the Constitution of the United States. (Printed Record 2a)

The Court conducted a hearing (printed record 4a) on the above Petition on May 18, 1962, and on June 15, 1962, granted the Petition to Suppress the Evidence (Printed Record 38a).

The Commonwealth of Pennsylvania on July 17, 1962, appealed the order of the trial court to the Supreme Court of Pennsylvania (Printed Record 1a). The Supreme Court of Pennsylvania on April 16, 1963, reversed the granting of the Motion to Suppress. (Appendix A).

The Petitioner filed a timely Petition for Reargument to the Supreme Court of Pennsylvania, and on June 3, 1963, the aforestated court denied the Petition per curiam.

ARGUMENT

The defendant petitioner believes that the Pennsylvania standard for determination of whether a search is incidental to a lawful arrest is inconsistent with the federal constitutional guarantees in this area as pronounced by the 4th, 5th and 14th amendments to the Constitution of the United States.

This case offers this court not only an opportunity to more fully explain the exclusionary rule of the Fourth Amendment as stated in *Mapp v. Ohio*, 80 S. Ct. 1684, as applied to the states through the 14th Amendment, but also an opportunity to decide the very question left open in *Kerr v. California*, No. 53, October Term, 1962 Supreme Court of United States, to wit, the reasonableness of a search without a warrant of an automobile when the search in question occurred days after the arrest, but is nevertheless claimed to be incidental to the arrest.

The Supreme Court of Pennsylvania in its opinion filed in the instant case before the *Kerr* case, supra, held that the states were free to formulate their own standards of reasonableness in search and seizure cases. Acting upon this premise, the Pennsylvania Court adopted the following test for use in determination of whether a search was incidental to a valid arrest:

> "Incidental" in its pertinent meaning refers to that which follows as an "incident" i.e. an event of accessory or subordinate character: The Oxford English Dictionary Vol 5. p. 152.

Applying this test, the Pennsylvania Supreme Court held that the search and seizure of the contents of Cockfield's car was clearly "incidental" to the arrest since it flowed naturally and was a part and parcel of the normal and logical consequences of the arrest.

It is the contention of the Petitioner that in the light of the *Kerr case*, supra, and the decisions of this court con-

struing the 4th, 5th and 14th Amendments, that the Pennsylvania test is invalid and denies the Petitioner and all others in the same category, their constitutional rights under the aforementioned amendments.

We submit that the use of the federal constitutional standard derived from the fundamental critera laid down by the 4th, 5th and 14th Amendments and the opinions of the court construing the same, will occasion a completely different result from the result reached under the Pennsylvania approach.

The Federal Constitutional standard dealing with a search incidental to a lawful arrest upon review of the applicable cases stated concisely seems to be the following:

1. That there must be a valid arrest. *Johnson v. United States*, 333 U.S. 10.

2. That the search must be contemporaneous with the arrest. *Agnello v. United States*, 46 S. Ct. 5.

3. That the search may be extended to the premises under the control or possession of the defendant at the locale of arrest. *Harris v. United States*, 67 S. Ct. 1098; *Rabinowitz v. United States*, 70 S. Ct. 430.

4. There is no right to search a premises distant from the point of arrest. *Agnello*, supra.

5. The fact that the search uncovers evidence of a distinct crime from the one for which the defendant is arrested does not invalidate the search.

6. Where the defendant was not present at the time and entry of the search and there were no compelling circumstances such as the destruction of evidence, the search could not be viewed as incidental to a valid arrest. *Chapman v. United States*, 365 U.S. 610; *United States v. Jeffers*; 342 U.S. 48; *Taylor v. United States*, 286 U.S. 1.

Applying the federal test in the case at bar, under no circumstances could the search be viewed as incidental to

the arrest, since the petitioner was in custody at the time of the search (some 54 hours) and therefore was not present at the time of entry. *Chapman*, supra. In addition the reported facts show that the arrest was not contemporaneous with the search. *Agnello* supra. It is submitted that there were no compelling circumstances necessitating the search since there was no danger of the destruction of evidence here since the record shows that the police evidenced by their laxity in this case (with the car parked across the street from the police headquarters for three days), were in no haste to subject it to a search. Finally it urged upon this court in connection with the issue of compelling circumstances, that although the object of the search was an automobile and under certain circumstances subject to a different rule than a search of a premises, the rule here would not be invoked, because the petitioners automobile was parked. See *Carrol v. United States*, 267 U.S. 132.

We are of the opinion that the infirmity in the Pennsylvania standard is that there are no apparent limitations in time or place upon the law enforcement authorities in the search of the defendant's property. In addition we submit that to allow the Cockfield decision to stand will not only result in the deprivation of 4th, 5th and 14th Amendment Constitutional protection to the citizens of Pennsylvania in this area, but will result in a situation where all fifty states may be encouraged to set up a similar standard or varying standards which will have the effect as here of nullifying *Mapp v. Ohio*, supra.

This is a novel question and has not been decided by the Supreme Court of the United States as noted above. See *Kerr*, supra. The determination of the questions involved in the instant case will determine whether *Mapp v. Ohio*, supra, and *Kerr v. California*, supra, afford substantial constitutional protection or illusory constitutional protection. The instant case was also a case of first impression in Pennsylvania and one Justice of the Supreme Court dissented from the majority view.

The instant case presents important questions in respect of the asserted rights, privileges and immunities of citizens of the United States. The instant case, as the opinion of the Supreme Court of Pennsylvania will show, was squarely decided on the ground that the states had the power under *Mapp*, supra, to formulate their own standards of reasonableness in the area of search and seizure cases. If the Pennsylvania view is upheld, then *Mapp v. Ohio*, supra, and *Kerr v. California*, have been effectively overruled.

The decision of the Supreme Court of Pennsylvania deprives the defendant petitioner of his rights contrary to the 4th, 5th and 14th Amendments of the constitution of the United States.

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APPENDIX "A"

Opinion of the Supreme Court of Pennsylvania

OPINION BY MR. JUSTICE BENJAMIN R. JONES, April 16, 1963:

The basic question raised upon this appeal is whether the search of an automobile and the seizure of some of the contents of the trunk of that automobile were incidental to a concededly valid arrest.

In the early morning of April 7, 1960, a dwelling house, located on North Frazier Street, Philadelphia and occupied by a Mrs. Quattlebaum (the deceased) and her two small children, was destroyed by fire and its occupants burned to death. While the fire was still burning, Detective Raifer went to the scene of the fire where he learned that "the fire had probably been caused by an accelerant."

While at the scent of the fire, Detective Raifer, having learned that the deceased had recently been having difficulties with a "boy friend", known as "Bill", interrogated a Miss Planet, the deceased's next door neighbor. Miss Planet identified "Bill' as Charles Cockfield, a resident of the "200 block" of South Alden Street. She told the police officer that Cockfield had exhibited "a pattern and action of violence" and, on one occasion, had put a knife to the deceased's throat; that the deceased had received threatening letters from Cockfield which Miss Planet had seen; that deceased's dwelling house had previously had a fire of unknown origin.

Acting upon this information, Detective Raifer went to Cockfield's home on South Alden Street but was unable to secure admission. Leaving other officers to maintain a surveillance of Cockfield's home, Detective Raifer, through his superior officer, ascertained that Cockfield was the registered owner of a 1953 Dodge automobile and, about 5:30 a.m., April 7th, this automobile, *its motor still warm*, was located about three-quarters of a block from Cockfield's home. Detective Raifer examined the automobile and its

glove compartment and kept the automobile under surveillance until about 8:15 a.m. on that date, at which time the car trunk was examined and, in addition to tools, a fruit basket and construction paraphernalia, there was found a "two gallon Gulf, blue and orange . . . gasoline can that was lying on its side" and under it ". . . a wet spot on top of the fruit basket . . . which smelled like gasoline" together with "a roll of sort of pale, green toilet paper, and, on the edge of the roll, itself, there were charred marks, charred as if from fire." The trunk was then closed and its contents left undisturbed.

Thereafter, the Cockfield automobile was removed by the police and placed in front of a nearby police precinct station where its distributor cap was removed and certain wires disconnected. All police districts were notified to report any inquiry concerning the whereabouts of this automobile. The automobile disappeared from in front of the precinct station that afternoon.[1]

In the early morning of April 8th, Cockfield was taken into custody at his home and in the early morning of April 9th made a statement to the police wherein he admitted that he had thrown gasoline from the can on the porch of the deceased's house in order to frighten her and show her what might happen, but he denied having ignited the gasoline or having anything to do with the fire. Thereafter, Cockfield was taken to his home for a change of clothing and then arraigned on charges of murder, manslaughter and arson.

The next day—April 10th—Detective Raifer searched Cockfield's car and seized the gasoline can and toilet tissue from the trunk. Neither in connection with the arrest of Cockfield nor with the search of his automobile and the seizure of some of its contents did the police officers have any warrant.

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[1] Cockfield, in the meantime, found his automobile in front of the precinct station, apparently was told the police did not want it, went out and bought the parts necessary to start it and removed the automobile to the residence of one Curtis Wally, Cockfield's friend.

On May 5th, 1962,[2] Cockfield's counsel moved to suppress as evidence the gasoline can and toilet tissue on the ground they had been obtained through an illegal search and seizure. After a hearing in the Court of Quarter Sessions of Philadelphia County before the HONORABLE GERALD GLEESON, that court directed the suppression of the evidence. From that order, the Commonwealth has appealed to this Court.[3]

Two questions are raised: (a) does *Mapp v. Ohio*, supra, require state courts to conform to federal tests as to the "reasonableness" of a search and seizure?; (b) was the search of Cockfield's automobile and the seizure therefrom of the gasoline can and toilet tissue a reasonable search and seizure within the Constitution purview?

The first question raised has been considered and determined in *Commonwealth v. Bosurgi*, 411 Pa. 56, A. 2d (1963). In *Bosurgi*, we have held that state courts are still free, in passing upon the "reasonableness" of a search and seizure, to apply their own, rather than federal, standards as to what constitutes "reasonableness".

As to the second question raised, since the validity and the legality of the arrest of Cockfield is not questioned, the "reasonableness" of the search, and the seizure depends basically upon whether such search and seizure were *incidental* to the arrest.

It is well established that, if an arrest is valid, a search and seizure which are incidental to that arrest are valid:

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[2] This was a post-indictment motion made over two years after the arrest (April 9th, 1960) and almost two years after indictment (May 19th, 1960) but prior to trial on the charges. It is difficult to understand, and the record discloses no reason, why Cockfield remained untried for a period of over two years after his arrest. Even though the search and seizure took place prior to *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, *Mapp* governs this situation and, if the evidence was illegally obtained, such evidence would be subject to suppression.

[3] On the right of the Commonwealth to appeal from this order, see: *Commonwealth v. Bosurgi*, 411 Pa. 56, A. 2d (1963).

Commonwealth v. Bosurgi, supra (p. 56) and cases therein cited.

In passing upon the validity of the search and the seizure in the case at bar certain facts have been established or assumed: (a) the search and seizure to which objection is made is that which took place on April 10, subsequent to the arrest, and not the alleged search which took place on April 7th, prior to the arrest; (b) the search and seizure took place 57 hours after Cockfield was taken in custody and 25½ hours after Cockfield's formal arraignment; (c) prior to Cockfield's arrest his automobile had been in the custody of the police for approximately 7 to 8 hours before it was repossessed by Cockfield and, during this period of time, no seizure of evidence took place although the evidence had been seen; (d) in Cockfields written statement to the police, given approximately 23 hours prior to the search of the automobile, reference is made to both the gasoline can and the toilet tissue in the trunk.

The court below, as clearly appears from an examination of its opinion, took the position that "ample opportunity was presented to obtain a search warrant and there was no compelling sense of urgency which would justify the search of the car without a warrant" and that "the search and seizure conducted two days later cannot be seen as being incident to the earlier initial arrest". On both grounds the court erred.

The absence of a search warrant cannot per se be equated with "unreasonableness" of a search. The United States Supreme Court in *U.S. v. Rabinowitz*, 339 U.S. 56, 65, 66, 70 S. Ct. 430, stated: "The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case." In *Commonwealth v. Czajkowski*, 198 Pa. Su-

In 1948, in *Trupiano v. U.S.*, 334 U.S. 699, 68 S. Ct. , the Court held that a valid arrest did not in itself justify a search without warrant and that the Government must show that under

perior Ct. 511, 516, 182 A. 2d 298, the Superior Court said: "We think that the search of the car at the police station turned upon its reasonableness and propriety under the circumstances rather than upon the practicability of procuring a search warrant." The fact that the police officers might have had the opportunity to secure a search warrant does not detract from the "reasonablesness" of the instant search if the "totality of the facts" surrounding the search and seizure were reasonable and, particularly, if the search and seizure were *incidental* to the valid arrest.

"Incidental", in its pertinent meaning, refers to that which follows as an "incident", i.e., "an event of accessory or subordinate character" (The Oxford English Dictionary, Vol 5, p. 152).[5] In our view, the search and seizure of the contents of Cockfields automobile were clearly "incidental" to the arrest and the one logically followed the other. The time which elapsed between the time of the arrest and the time of the search does not destroy the character of the search as incidental to the arrest. The search and seizure flowed naturally from and were part and parcel of the normal and logical consequences of the arrest. Had the police officers not searched this automobile and seized this gasoline can and tissue they would have been derelict in their duties. Their actions did not constitute an unlawful or unconstitutional invasion of the right of privacy of Cockfield and, viewed under all the circumstances presented on the instant record, the search and seizure were clearly "reasonable" in nature and "incidental" to the valid arrest.

The court below in suppressing the evidence secured by this lawful search and seizure was clearly in error.

Order reversed.

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the circumstances it was unreasonable or impracticable to require the arresting officer to obtain a warrant. In *Rabinowitz*, supra (p. 66), in 1950 the Court said: "To the extent that *Trupiano v. U.S.*, supra, requires a search warrant solely upon the basis of the practicality of securing it rather than upon the reasonableness of a search after a lawful arrest, that case is overruled."

[5] See: *State v. Brooks*, Wash. , 357 P. 2d 735, 735.

DISSENTING OPINION BY MR. JUSTICE COHEN:

In attempting to justify the searches and seizures in *Commonwealth v. Bosurgi* and *Commonwealth v. Cockfield*, the Commonwealth presents alternative arguments: (1) either the searches were valid under federal standards, or (2) *Mapp v. Ohio* does not require state courts to follow federal standards and the seizures involved do not violate the due process clause of the fourteenth amendment since they resulted from reasonable police activity. In holding that the evidence need not be suppressed, the majority first declares that *Mapp v. Ohio* does not require state courts to follow federal standards. It then proceeds, however, to uphold the searches under federal standards, a decision which renders its statements about the impact of *Mapp v. Ohio* as obiter dictum.

I dissent from the decisions in *Bosurgi* and *Cockfield* for two reasons. First: I disagree with the majority's view that these seizures can be upheld under federal standards. Secondly, even assuming that *Mapp v. Ohio*, permits state courts to adopt less strict standards for judging the reasonableness of a search and seizure,[1] the police activity in these cases[2] violates the fourteenth amendment's guarantee against invasions of privacy.[2]

In *Bosurgi*, the majority holds that an uncorroborated tip from an anonymous informant constitutes "probable cause" to arrest, thereby validating a search without a warrant incident to the arrest. Such holding is directly contrary

[1] The possible interpretations of the *Mapp* decision are set forth in Note, The Supreme Court 1960 Term, 75 Harv. L. Rev. 40, 152-58 (1961). See also, Justice HARLAN's concurring opinion in the recent United States Supreme Court decision of *Gideon v. Wainwright*, 31 U.S. L. Week 4291 (March 18, 1963).

[2] In *Wolf v. Colorado*, 338 U.S. 25, (1949), the United States Supreme Court held that the fourth amendment's protection against invasions of privacy is embodied in the fourteenth amendment. In *Mapp*, the Court took the next logical step and held that evidence obtained in violation of this Constitutional guarantee must be excluded by state courts.

to the federal cases on this point. The federal law is summarized as follows: "All the cases in which a 'tip' has been heavily relied upon to estabilsh probable cause have stressed the need for 'a substantial basis for crediting the hearsay,' (citing a case), or a record of 'accurate and reliable information,' (citing a case); in short, 'a previously reliable informant,' (citing a case). Prudent and cautious men would not act in so decisive a fashion in reliance on an uncorroborated anonymous caller. . . ." (*Costello v. United States*, 298 F. 2d 99, 101 (9th Cir. 1962).[3] Therefore, the search and seizure in *Bosurgi* cannot be upheld under federal standards.

The majority's conclusion that there was "probable cause" under the federal cases for the arrest of defendant Bosurgi is all the more surprising in view of the fact that the Commonwealth places little emphasis in its brief upon justifying the seizure under federal standards. The Commonwealth's main argument is that we should break away from the rigid federal formulas for judging the legality of searches and seizures, and instead, establish a test of whether the police activity in question was reasonable under the circumstances.[4] Without deciding whether we are free to adopt the standard proposed by the Commonwealth, I cannot agree that the police acted in a reasonable manner in *Bosurgi*. No explanation is offered why the police did not first observe defendant's activities in the taproom and at-

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[3] The most recent United States Supreme Court cases on what constitutes "probable cause" to arrest are *Henry v. United States*, 361 U.S. 98 (1959) (no probable cause); *Draper v. United States*, 358 U.S. 307 (1959) (probable cause where a paid, reliable informant and tip corroborated by personal observations of the arresting officer); and *Jones v. United States*, 362 U.S. 257 (1960) (probable cause where a reliable informant and defendant a known user of narcotics).

[4] The practical significance of such a test would be to permit arrests where only reasonable suspicion exists that defendant has committed an offense, and to permit searches without warrants although not made incident to an arrest. See Specter, *Mapp v. Ohio*: Pandora's Problems for the Prosecutor, 111 U. Pa. L. Rev. 4 (1962).

tempt to corroborate the anonymous tip, instead of immediately arresting and searching him. Therefore, even under the test suggested by the Commonwealth, I would hold that the evidence seized in *Bosurgi* must be suppressed.

Turning next to the *Cockfield* decision, the majority holds that the search of the automobile without a warrant was justified under the federal rule of "search incident to arrest," although at the time of the search defendant-Cockfield had been safely behind bars for 24 hours and the automobile was parked across the street from the police station. The meaning and rationale behind the search incident to arrest doctrine—the only occasion under federal law where a search can be conducted without a warrant—is not to be sought in the Oxford English Dictionary, as the majority does, but rather in the considerable body of federal law dealing with that concept. The two purposes of the rule are to protect the arresting officer from bodily harm, and to prevent the defendant from destroying evidence which is "within his control." See *United States v. Rabinowitz*, 339 U.S. 56 (1949). Where, as here, the defendant has been in custody for 24 hours the rule is obviously inapplicable. *United States v. Agnello*, 269 U.S. 20 (1935).

In addition, no explanation is offered why a search warrant was not secured. Although *Rabinowitz* holds that it is not necessary for the prosecution to justify in each case the failure to obtain a search warrant, the failure to secure a warrant where, as in the instant case, one could easily be obtained without danger of a disappearance of the evidence, is a factor in determining the validity of the search and seizure. See *Chapman v. United States*, 365 U.S. 610 (1961).

The failure to obtain a warrant under the circumstances presented in *Cockfield* would also lead me to hold, under the test suggested by the Commonwealth, that the police activity was not reasonable or proper. Therefore, I would hold that the evidence must be suppressed under either alternative presented by the Commonwealth.

For the above reasons, I dissent in *Commonwealth v. Bosurgi* and *Commonwealth v. Cockfield*.

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vs.

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On Petition For Writ of Certiorari To The Supreme Court of Pennsylvania

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1A. Where the Decree of the Supreme Court of Pennsylvania sought to be reviewed overruled the order of the Court of Oyer and Terminer of Philadelphia County, granting the prayer of the petitioner here to suppress certain evidence which petitioner contends were the fruits of an unreasonable search and seizure, is that Decree final so as to warrant pre-trial examination by this Court?

1 and 2 The questions as stated in the Petition are apt for considering subsidiary questions which may arise.

JURISDICTIONAL STATEMENT

Jurisdiction is contested upon the ground that the decree rendered by the Supreme Court of Pennsylvania, the highest court of that state in which a decision could be had, is not a final decree, but is merely interlocutory.

STATEMENT OF THE CASE

The statement of the case in the Petition is a fair presentation of the facts. Respondent believes that small additions and corrections will make for a more complete grasp of the facts.

Line 3: The information received at the scene of the fire was that there was evidence that an accelerant had been applied, and, further, that petitioner had used physical violence and had once even held a knife to the throat of the young mother, who, with her two small children, died in the fire (6a) and lastly that a fire of unknown origin, but causing small damage, had broken out in the same dwelling on a prior occasion (8a).

Line 12: The car belonging to petitioner was warm at about 5:30 A.M., the morning of the fire, when the officers located it, parked around the corner from petitioner's house (14a-15a). The fire broke out about 2:30 A. M.

Line 17: The toilet tissue was charred, as if from fire (17a).

Line 19: Through a typographical error, there appears the phrase "beneath the car . . .", it should read "beneath the can. . . ." (14a, 16a).

ARGUMENT

1A. The Petition Must Fail for Want of Finality.

The need for strict adherence to the rule requiring finality in the decree or order complained of is many times multiplied in comparison to the situation ten or fifteen years ago. Under present practice and attitudes, the State procedures are regarded by defendants as primarily springboards to federal jurisdiction. This Court, fifteen years ago, emphasized the need of strict scrutiny in *Republic Natural Gas Co. v. State of Oklahoma*, 334 U.S. 62, 68 S. Ct. 972, a civil suit of very great importance. The opinion (334 U.S. at 69-72; 68 S. Ct. 977-8) pointed out the burden upon petitioner of affirmatively establishing this Court's jurisdiction; the policy against premature constitutional adjudications, against fragmentary review, leading to the ruling found in many cases that a case must await its culmination in the judicial process of the State before being ripe for consideration by this Court. It was reiterated that all of petitioner's constitutional objections are of course preserved.

In *Wilson v. Schnettler*, 365 U.S. 381, 384, 81 S. Ct. 632, 634-5, in rebuffing the attempt through equity proceedings to side-track criminal charges, this Court pointed out that if, at the criminal trial, the State Court (Illinois) adhered to its interlocutory order on the suppression issue to petitioner's prejudice, he has an appeal to the Supreme Court of that State, and a right, if need be, for review by the Court of any federal questions involved.

The lack of finality of an order denying a motion to suppress evidence has been upheld in Pennsylvania in *Commonwealth v. Diggs*, Superior Court, No. 141, October Term, 1962, in which the Superior Court sustained a motion by the Commonwealth to quash an appeal by defendant from such order.

The complaint of harm to a defendant in thus compelling him to undergo the hardships of trial was held unavailing in *Parr v. United States*, 351 U.S. 513, 518;

76 S. Ct. 912, 917-18 (1956). There it was held that maneuvering by the government to avoid an unfavorable forum was not subject to complaint. The opinion pointed out that the hardships and expense of defending against prosecution, even for an innocent person, is one of the painful obligations of citizenship. Respondent pointed out in its Brief in the Supreme Court (p. 17) that all of those questioned by police in their investigations suffer the invasion of their time and privacy in carrying out the ordinary obligations of members of society. *Mapp v. Ohio*, 367 U. S. 645, was decided upon certiorari after conviction, not upon a motion to suppress.

Petitioner has presented no reasons for the granting of an exception to the basic rule that certiorari will be denied where no terminal point will be reached thereby.

I.—II.

The questions presented by Petitioner are not ripe for consideration by this Court in this case at this stage of the proceedings. Petitioner does not set out circumstances which bring it within the provisions of Rule 19 (a) of this Court, nor does he allege any circumstances persuasive of a condition not indicated in the Rule which should be considered.

There is nothing to indicate that the decision of the Pennsylvania Court is in conflict with any applicable decisions of this Court. There is nothing to bear out a claim that the Supreme Court of Pennsylvania has decided a federal question of substance; certainly the technique used here did not approximate those activities which have been held to oust the jurisdiction of a trial court. No cases holding the contrary have been cited by Petitioner.

The Supreme Court of Pennsylvania states that the search and seizure sought to be reviewed was that which took place April 10, 1960, after the removal of the car with its contents to the police station. Respondent, in its Brief in the Supreme Court of Pennsylvania, concentrated upon the *reasonableness* of the actions of the police (pp. 15-19 of

Commonwealth's Brief). We have seen that a search and seizure before an arrest and while the suspect is eluding capture may be entirely reasonable. We repeat the arguments of the brief that no unreasonable search or seizure was made at any time, either April 7 or April 10.

Similarly, a consideration of the suggestions of Rule 19(b) fails to reveal a reason for the grant of certiorari at this time.

Eisentrager v. State Supreme Court of Nevada, 378 P. 2d 526 (1963) involved a search and seizure prior to arrest. A landlady, having made several days' efforts to reach a roomer, without receiving a response, entered the room by means of a pass key. The body of the tenant, obviously the victim of a murder, was in the room. Her paramour, who had posed as her husband, was not present. The actions of the police, summoned by the landlady, in proceeding about their normal homicide investigations, without obtaining a warrant, were upheld. Seizing various articles from the apartment, the officers sealed the door, returning at will for further investigation. The paramour surrendered to the police (528) during the evening of the day the body was discovered, and the investigation continued while he was in custody. No warrant was ever procured. The Supreme Court of Nevada upheld the police activities as reasonable and in the line of duty (530).

California has likewise recognized that a search made before arrest is reasonable, the test being reasonable cause to believe a felony has been committed. *People v. Sayles*, 140 Cal. App. 2d 657, 295 P. 2d 579.

The record which this Court has before it is lacking in detailed coverage which is necessary to decide a constitutional question in which all of the surrounding circumstances are to be considered in testing the reasonableness of the search and seizure. The finding of the Supreme Court of Pennsylvania, that the search and seizure under examination before them was that of January 10th, would not bind a jury which, with all of the facts presented through a complete roster of witnesses, might well find that the search of

the car and the removal of the car to the station house on January 7th was a de facto seizure. The facts simply were not developed at the sketchy proceedings on the motion to suppress. Surely this is not the case or the record upon which to base definitive rulings such as petitioner suggests.

CONCLUSION

Petitioner has not presented a case in which the rules governing certiorari should be stretched in the interest of a non-existent important federal question.

Respectfully submitted,

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